



Date: March 17, 1998

Case No.: 97-INA-79

In the Matter of:

Isaura Rubinstein
Employer,

On Behalf of:

Carmela Avelar-Valdez
Alien.

APPEARANCES: Jon H. Channels, Esq.
Los Angeles, California
for Employer and Alien

BEFORE: Burke, Wood, and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam

This case arose from an application for labor certification on behalf of Alien Carmela Avelar-Valdez, ("Alien") filed by Employer Isaura Rubinstein ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, California, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On September 25, 1995, Employer filed an application for labor certification to enable Alien to fill the position of Cook, Domestic Service. (AF 41-74). The job duties for the position are:

Prepare and cook family-style meals. Cook according to menu and number of persons to be served. Plan menus and serve meals, order supplies and keep record and account of groceries being purchased. Cook specialty dishes for special occasions such as parties.

(AF 41).

The experience required is two years in the job offered. *Id.*

In the Notice of Findings (“NOF”) issued on March 28, 1996, the CO proposed to deny certification on the grounds that the job opportunity was not bona fide because it was not full-time and not clearly open to qualified U.S. applicants, that Employer was not clearly able to pay the offered wage, and that U.S. workers were unlawfully rejected based on unstated job requirements. (AF 33-39).

Employer submitted its rebuttal on May 6, 1996. (AF 22-25). The rebuttal consisted of a letter from Employer and copies of her tax return 1040 form for 1995. Employer stated that the two U.S. workers were not qualified because they could not prepare various types of dishes for a private household.

The CO issued the Final Determination (“FD”) on June 26, 1996, (AF 18-21), denying certification because Employer failed to document that a bona fide job opportunity exists, that Employer can pay the offered wage, and that the two U.S. workers were rejected for lawful reasons. The CO determined that both U.S. workers were rejected for unlawful reasons because preparing ethnic dishes was not a requirement listed on the ETA-750 A and because one of the workers had been employed as a chef in an institutional setting.

On July 25, 1996, Employer filed a request for review. (AF 1-17). This request provided more detailed responses to the issues in the NOF and included copies of Schedules A, B, and C. On November 22, 1996, the CO forwarded the record to this Board of Alien Labor Certification Appeals (“Board”). On January 6, 1997, Employer submitted a letter indicating that the grounds for the appeal were provided in Employer’s request for review.

DISCUSSION

This Panel has not considered the documentation submitted by Employer with its request for review as it was not considered by the CO in its denial. Our review is based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27 (c). *See Sharp Screen Supply, Inc.*, 94-INA-214 (May 25, 1995); *ST Systems, Inc.*, 92-INA-279 (Sept. 2, 1993); *Schroeder Brothers Co.*, 91-INA-324 (Aug. 26, 1992).

Although the practicality of enumerating peripheral job restrictions in the application and the advertisements must be considered on a case-by-case basis, *Jeffrey Sandler, M.D.*,

89-INA-316 (Feb. 11, 1991) (*en banc*), as a general matter, an employer unlawfully rejects an applicant where that applicant meets the employer's stated minimum requirements, but fails to meet requirements not stated in the application or in the advertisement. While an employer may contemplate that certain duties specified in its job description may require certain education and/or experience, these requirements must be specified by the employer; rejection of U.S. workers for not meeting unspecified requirements constitutes unlawful rejection of qualified U.S. workers pursuant to § 656.21(b)(6). *Photo Network*, 89-INA-168 (Feb. 7, 1990).

In this case, the ETA 750-A lists "cook specialty dishes for special occasions such as parties" as a job duty. (AF 41). Employer stated in the recruitment report that one applicant was rejected since "she explained that she did not know how to cook specialty dishes such as ethnic foods. She was not hired because she is unqualified for this position." (AF 44). The other applicant was rejected because "he did not know how to cook ethnic dishes." *Id.* The CO found that the two U.S. workers were rejected for unlawful reasons because the requirement for cooking ethnic dishes was not listed on the ETA 750-A. (AF 37-38). In rebuttal, Employer asserted that she did not have time to train the U.S. applicants on how to prepare different types of dishes. (AF 22).

The ability to prepare ethnic dishes is not listed as a requirement on the ETA 750-A. "Specialty dishes" could be interpreted several ways and does not necessarily refer to ethnic dishes. Therefore, Employer rejected the U.S. applicants for an unstated job requirement in violation of § 656.21(b)(6) and certification was properly denied on these grounds.

As unlawful rejection of U.S. workers is sufficient grounds for denial of labor certification, the other two issues will not be addressed. Accordingly, the following Order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the Panel:

TODD R. SMYTH
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.